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In The

Supreme Court of the United States

OCTOBER TERM, 1968

No. 320

PERRY J. OWENS,

Petitioner

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Statutes:

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v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Perry J. Owens, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 23, 1968.

Opinion below at 393 F (2) 77, is printed in Appendix B hereto, infra, p. 1b. Opinion on rehearing as Appendix C at p. 1c, infra.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 23, 1968. Rehearing was denied on May 28, 1968. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. To determine the duty of the reviewing court in the circumstance where there is a complete absence of probative facts to support the jury answer to a special issue.

2. To declare the application of Rules 50 and 51 to a Federal Employers' Liability Act case.

Statute Involved

The statute involved is 45 U.S.C.A. Sec 53, printed in Appendix A, p. 1a, supra.

Statement

Petitioner, an employee of the defendant, sought to recover under the F.E.L.A. for several acts of negligence, including: "The act of the employee Johnson in losing his foot and falling upon plaintiff." The employee Johnson testified that while wearing goggles over his eyes that had become fogged from the heat of handling hot rivets which interfered with his ability to see clearly and well, started to step across an opening some five or six feet above the plaintiff and missed his step because he was not looking at the place where he was seeking to step but could have made the maneuver had he been looking, and thus fell in upon the plaintiff injuring him. There was no testimony or circumstances to refute Johnson's admitted act of carelessness.

Respondent offered no witnesses as to the accident or its occurrence.

Yet a Dallas, Texas, jury found that the act of the employee Johnson in losing his balance and falling upon the plaintiff was not negligence, as well as absolving the defendant of all other acts of negligence submitted.

Since there were other grounds of primary negligence asserted by petitioner, as well as grounds of contributory negligence asserted by respondent, which did present fact issues for the jury's decision, no motion for directed verdict was requested by Petitioner.

However, when the jury absolved the Petitioner of any contributory negligence Petitioner moved for a judgment n. o. v., before entry of judgment, and alternatively for a new trial, raising the point that there was no evidence to support the jury's answer to this one question and that the undisputed evidence compelled an answer favorable to the Petitioner. Both motions were by the trial court overruled and judgment entered for Respondent, from which judgment Petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit. That Court held that it was "powerless to review" Petitioner's principle contention "... that there was no evidence to support the jury's finding that [a fellow servant] was not negligent [in injuring plaintiff]," giving as its reason Petitioner's failure

to file a motion for a directed verdict or to object to the charge.

Reasons for Granting the Writ

1. The decision of the court below in the instant case is directly in conflict with the decision of the Third Circuit Court of Appeals in *Paluch v. Erie, Lackawana R. Co.,* (Appendix D, p. 7a, infra) 387 F.2d 996 (3rd Cir. 1968); *Freifield v. Hennessy,* 353 F.2d 97, 99 (3rd Cir. 1965); *Atkinson v. Roth,* 297 F.2d 570, 575 (3rd Cir. 1962).

In the *Paluch* case the Third Circuit reached the error of the trial court in submitting contributory negligence when the record showed an absence of any fault and there was no contrary evidence of the existence of any fault, absent any objection to the charge, motion n. o. v., or ground assigned in motion for new trial. That court said "This fundamental error compels a new trial."

2. Since the trial judge did not submit a general charge but submitted special issues, and since the defendant had insisted upon several defenses, Petitioner was not entitled to a directed verdict. *Fairmount Glass Works v. Cub Fork Coal Company,* 287 U.S. 474, 484, 53 S.Ct. 252, 255; 77 L.Ed 439.

3. The failure of the courts to recognize the distinction between "no evidence" and "sufficiency of the evidence" is compounding confusion in the Cir-

cuits. When affirmative eyewitness testimony supports the existence of a fact, and when a detailed search of the record fails to turn up any countervailing probative evidence, a miscarriage of justice is bound to result when the verdict fails to respond to that fact. This very exceptional condition should present a question of law that can be squarely reached; and not hidden under such subterfuges as "fundamental error," "abuse of discretion," "miscarriage of justice."

4. Rules 50 and 51 lend themselves very inexpertly to the use of the plaintiff in an F.E.L.A. case. As pointed out in *Sears v. Southern Pacific Co.*, 313 F.2d 498 (9 Cir. 1963), at common law the relative comparison of the negligence of each party is immaterial, but under the F.E.L.A. the jury must consider not only all acts of negligence (i.e., quantum) but also the quality of each of said acts, citing *Norfolk & Western Ry. v. Ernest,* 229 U.S. 114, 122, 33 S.Ct. 654, 657, 57 L.Ed 1096. As said by the Sixth Circuit in *New York C. & St. L. R.R. v. Niebel,* 214 Fed. 952 (Sixth Cir. 1914):

> "Under the rule of comparative negligence, the jury is entitled to consider all of the circumstances which characterize the negligence of either party and which tend to fix the quantity and quality of that negligence in its relation to the sum total of the negligence of both parties. *Even though the negligence of either party clearly appears,* all circumstances of aggravation or of mitigation must be considered. . . ."

(Emphasis added.)

Assuming evidence that would raise the three grounds of the Railroad Company's negligence and that one such ground exists without dispute, or as a matter of law, in a special issue submission does the trial court hold the one ground back, or give it to the jury with instructions that they cannot disregard it, or submit all grounds without comment? How may plaintiff protect himself? Even though the evidence compels an answer of "yes" to the one issue, he is not harmed by its submission, but only by the jury giving a false answer. The harm flows from the jury not following the evidence, or disregarding the evidence, or refusing to follow the law. This does not become apparent until the answer has been received, and at that moment your Petitioner did file a motion for judgment and followed it with a motion for new trial, raising the very specific error that the jury committed. To permit the false answer to stand is a miscarriage of justice. To refuse to reach it as the Fifth Circuit did smells of pettifoggery. To hold that it is "powerless to review" such contention is to deny Petitioner a fair trial.

5. Clearly, the questions presented are of importance in the application of the Federal Employers' Liability Act. Settlement of the question by this Court is plainly in the public interest since it is likely to arise in every case except the one where there is only a single ground of negligence.

6. The decision of the court below is believed

to be erroneous and the conflicting decision in the Third Circuit is the correct approach to the matter. The appellate courts and the attorneys need a tool by which they can assign errors in law created by a jury refusing to follow the evidence or the law so as to prevent miscarriage of justice when that error becomes apparent after the jury has returned its answers into court.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MULLINAX, WELLS, MAUZY, LEVY & RICHARDS

By Otto B. Mullinax

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APPENDIX A

45. U.S.C.A. §53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

APPENDIX B

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25134

PERRY J. OWENS,

Appellant,

versus

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(April 23, 1968.)

Before THORNBERRY, AINSWORTH and DYER, Circuit Judges

PER CURIAM: This Federal Employers' Liability Act suit, 45 U.S.C. § 51, arose out of an accident that occurred while Appellant Owens, an employee of appellee, was working with a rivet gang of carmen in repairing a pulpwood car at one of the appellee's railroad yards in Texas. During the work, one of the other employees, John Johnson, missed his footing on a beam and fell on Owens thereby injuring him. Appellant brought this suit alleging that appellee was negligent in failing to provide

him with a safe place to work; that appellee was negligent in failing to provide John Johnson with a safe place to stand while working; and that appellee's employee, John Johnson, was negligent in losing his footing and falling on appellant. These allegations were submitted to the jury on special issues and the jury found no negligence on each ground. The jury also found that Owens had not been negligent. The district court denied motions for new trial and for judgment notwithstanding the verdict and entered a judgment for appellee.

Appellant's principal contention is that there was no evidence to support the jury's finding that Johnson was not negligent in falling on him. This Court is powerless to review this contention since at the trial appellant failed to attack the sufficiency of the evidence in any manner available to him. First, it is well settled that the sufficiency of the evidence is not reviewable on appeal where, as here, a motion for a directed verdict was not made to the trial court. *See Helene Curtis Industries, Inc. v. Pruitt,* 5th Cir. 1967, 385 F.2d 841, 851; *Pennsylvania National Mutual Casualty Insurance Co. v. Nathan,* 5th Cir. 1966, 361 F.2d 18, 20; *Powers v. Gilmore,* 5th Cir. 1961, 297 F.2d 138; *Pruett v. Marshall,* 5th Cir. 1960, 283 F.2d 436. Second, appellant did not even object to the submission of the special issue that inquired whether Johnson was negligent in falling on appellant on the ground that there was no evidence to support the submission. This also precludes appellant from challenging the sufficiency

of the evidence to support the jury's verdict. *Berman v. Palatine Ins.*, 7th Cir. 1967, 379 F.2d 371, 373; *Rochester Civic Theatre, Inc. v. Ramsay*, 8th Cir. 1966, 368 F.2d 748; *Stokes v. Continental Assurance Co.*, 5th Cir. 1957, 242 F.2d 893, 894; *Beodreaux v. Mississippi Shipping Corp.*, 5th Cir. 1955, 222 F.2d 954. A party who fails to employ either of these methods "must be of the view that the evidence makes a case for the jury and should not be permitted to impute error to the court for sharing that view." 2B Barron & Holtzoff, *Federal Practice and Procedure* at 424 (Wright ed. 1961).

Appellant next complains that the trial judge erred in admitting into evidence portions of Owens' deposition that showed he had previously stated that he considered the working conditions safe and proper and that he did not know of anything appellee could have done to prevent the accident since Johnson simply lost his balance and fell. Appellant's argument that this deposition was inadmissible as opinion testimony is without merit since it is well settled that the opinion rule does not apply to a party's admissions. 4 *Wigmore, Evidence* § 1053 at 15 (3d ed. 1940). Finally, this Court's reasoning in *Cox v. Esso Shipping Co.*, 5th Cir. 1957, 274, F.2d 629, refutes the contention that appellee was required to lay a predicate for the introduction of the statements:

> An admission, rightly understood but so often confused, in its classic prototype is merely—but significantly—a position taken by the

> adversary . . . which is contrary to and inconsistent with the contention now being made in the litigation. It is that simple. It need not have been, as is so often said, an admission against interest, nor is there a need a lay a predicate for its use. All that is needed is an authoritative statement by the adversary inconsistent with the contemporary litigation position.

274 F.2d at 632.

Therefore, the judgment of the district court is AFFIRMED.

APPENDIX C

On Petition for Rehearing En Banc

(May 28, 1968)

Before THORNBERRY, AINSWORTH and DYER, CIRCUIT JUDGES.

PER CURIAM.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

APPENDIX D

Paul P. PALUCH, Appellant,

v.

ERIE LACKAWANNA RAILROAD COMPANY

No. 16463.

United States Court of Appeals
Third Circuit

Argued Sept. 29, 1967.
Decided Jan. 3, 1968.
Rehearing Denied Feb. 6, 1968.

Before McLAUGHLIN, HASTIE and FORMAN, Circuit Judges.

OPINION OF THE COURT

FORMAN, Circuit Judge.

[1] Apellant, Paul P. Paluch, brought this action in the United States District Court for the District of New Jersey under the Federal Employers' Liability Act[1] against his employer, Erie Lackawanna Railroad Company (Railroad), to recover damages

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1. Except in extraordinary circumstances, not present here, an order denying a motion for a new trial is not appealable. However, where as here, the appeal is timely taken in regard to the final judgment and the intent of the appellant to appeal from the final judgment is clear, it is the general rule to treat the appeal from the order denying the new trial as harmless error and to consider the appeal as if taken from the final judgment. Croming v. Pittsburgh & Lake Erie R.R. Co., 327 F.2d 142, 144 (3 Cir. 1964); 6A Moore, Federal Practice, ¶ 59.15[1] (2d ed. 1966). Accordingly, this appeal will be treated as if taken from the final judgment.

for injuries sustained in the course of his employment. The jury rendered a verdict for the appellant. Attacking the verdict, principally on the ground of is gross inadequacy, the appellant sought a new trial. From the order of the District Court denying the motion for a new trial, appellant brought this appeal'. Appellant raises two issues: first, he renews his contention that the verdict is grossly inadequate, and second, he argues that the verdict is contrary to law.

The essential factual background is that appellant, aged 52, at the time of his accident on February 13, 1964, was employed as a signalman. He was one of a crew of workmen under the direction of a foreman, William Brickman, who was to remove wires from telegraph poles along the Railroad's right of way on the Boonton Branch west of its station at Paterson.

Appellant was assigned to the task of cutting the wires attached to cross arms at the top of a pole 29 feet high. He had never performed such work and was unfamiliar with the condition of the pole. Appellant inquired from Mr. Brickman, who was long experienced, whether the pole was safe. He was assured that it was. Thereupon he mounted the pole, stationed himself at one of the cross arms and cut each of the wires attached thereto pursuant to a signal given him by Mr. Brickman. The wires were simultaneously cut from another pole and when thus freed they were conducted by other work-

ers to a truck equipped with a winch, which wound the removed wires on a reel. As appellant cut the last wire the pole toppled to the ground with appellant still clinging to its side.

The pole that fell was known as a "dead end" pole. Wires ran to it and then down to a relay case in the ground. The evidence indicated that the pole which appellant was required to climb was rotted and completely severed at ground level. A "stub" pole had been driven beside it and was lashed to it with wire in order to support it. Mr. Brickman testified that on the day before the accident he went to the job site to inspect the condition of the pole. He stated that he pushed the pole back and forth and also stuck his penknife into the stub pole at ground level. From his tests he concluded that the pole was safe to climb. After the accident it was learned that the stub pole too had rotted just below the ground level.

As a result of the fall appellant, was rendered unconscious for about seven hours. One of the step spikes on the pole penetrated his face fracturing his cheekbone; his right tibia was also fractured resulting in a permanent one-quarter inch shortening of the leg; he sustained a concussion with minute hemorrhages within the brain tissue. Appellant was confined in a hospital as a result of these injuries for 28 days. He testified that among the effects of his injury his right wrist, which was sprained by the fall, swells when he attempts to climb a lad-

der; that he still suffers from dizziness when he bends too far forward or backward; and that he has difficulity concentrating because of a burning sensation in his head and ringing in his ears.

Seven months after the accident appellant returned to work. His loss of wages during that period totaled $3,636.80, and together with the medical expenses he personally incurred, it was shown that his out of pocket expenses amounted to at least $4,210.55. The verdict the jury returned was for $6,000.

The Federal Employers' Liability Act provides that contributory negligence shall not be a bar to recovery under the Act. If an employee is shown to have been contributorily negligent then the jury shall be instructed to diminish the damages recoverable in proportion to the employee's negligence.[2] The District Judge submitted the case to the jury with these instructions on the issue of damages.

[2-5] In maintaining that the verdict was contrary to law, appellant asserts that the Railroad "made no reference to any act of contributory negligence on the part of the plaintiff, nor did it present

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[2] U.S.C. §53.

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *."

any proof of it." In a case such as this, under the Federal Employers' Liability Act, the burden of proving contributory negligence is, of course, on the Railroad.[3] The entire record has been scrutinized to determine the validity of appellant's position that the Railroad failed to establish any contributory negligence. The evidence clearly indicated that appellant was totally inexperienced in the work he was instructed to undertake. He was justified in relying on the experience of his superior, Mr. Brickman, who was in complete control of the work crew. Mr. Brickman indicated to appellant that he had tested the pole and found it to be safe. As it turned out, the stub pole, as well as the main pole, was rotted below the surface level. If Mr. Brickman, a man of experience, did not discover the defect, there is no ground to assert that the appellant was contributorily negligent on the basis that he did not find the pole defective, a contention advanced by the Railroad. Certainly, it is not contributory negligence to fail to discover a danger when there is no reason to apprehend one.[4] From the evidence presented at the trial of this case, a jury could not properly find a lack of due care by the appellant. It was, therefore, fundamental and prejudicial error for the District Court to charge the jury on the issue of contributory negligence and its diminishing

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3 Central Vermont Ry v. White, 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed 1433 (1915); Mumma v. Reading Co., 247 F. Supp. 252 (E.D. Pa. 1965).

4 Morran v. Pennsylvania R.R. Co., 321 F.2d 402, 403 (3 Cir. 1963).

effect upon any verdict it might find in favor of appellant.[5]

Counsel for appellant, however, failed to seasonably object to the District Judge's charge on contributory negligence. It was not until the oral argument in support of the motion for a new trial that counsel for appellant argued that no proof had been offered by which appellant could be found contributorily negligent. In denying the motion for a new trial the District Judge declined to rule as a matter of law that there was no contributory negligence. Indeed, he took occasion then to allude to the probable finding by the jury of contributory negligence as the reason for the verdict of $6,000.

[6-8] Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.[6] has not been overlooked. It generally prevents a party from assigning as error on appeal an instruction to the jury when no objection to the instruction was made prior to the jury's retirement. A purpose of the rule is to assure the trial court an opportunity to make appropriate cor-

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5 Smith v. Lauritzer, 356 F.2d 171 (3 Cir. 1966); Eichmann v. Dennis, 347 F.2d 978 (3 Cir. 1965); Moore v. Smith, 343 F.2d 206 (3 Cir. 1965); Morran v. Pennsylvania R.R. Co., 321 F.2d 402 (3 Cir. 1963); O'Neill v. Reading Co., 306 F.2d 204 (3 Cir. 1962).

6 Rule 51 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

rection of its rulings and instructions.[7] The lapse of appellant's counsel in failing to comply with the rule is not to be encouraged. Nevertheless, this court has declined to permit such a technicality to cause a miscarriage of justice.[8] In Freifield v. Hennessy, 353 F.2d 97, 99 (3 Cir. 1965), the court stated:

> "Where it is apparent on the face of the record that counsel failed to object to a fundamental and highly prejudicial error, and this failure may have resulted in a miscarriage of justice, the error must be noticed and rectified."

Thus, in rare instances, where fundamental error occasions a miscarriage of justice, this court will notice such error despite counsel's failure to comply with rule 51.[9] The charge to the jury in this case on an issue on which no evidence had been offered was such fundamental error. Allowing the jury to speculate on contributory negligence and thereby possibly to diminish the compensation recoverable, under the circumstances of this case, was a miscarriage of justice.

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[7] 5 Moore, Federal Practice, ¶ 51.04 (2d ed. 1966).

[8] In Atkinson v. Roth, 297 F.2d 570, 575 (3 Cir. 1962), the court in commenting on counsel's failure to enter a proper objection, stated:

> "We are not unconcerned with the failure of counsel to perceive and bring to the attention of the court, on the record, such matter. But, the function of the trial judge necessarily extends beyond conclusive reliance upon counsel. It is the administration of justice with which we are dealing, and this includes the prevention of a miscarriage of justice."

[9] Ratay v. Lincoln Natl Life Ins. Co., 378 F.2d 209 (3 Cir. 1967), cert. denied, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967); Freifield v. Hennessy, 353 F.2d 97 (3 Cir. 1965); Mazer v. Lipschutz, 327 F.2d 42 (3 Cir. 1963); McNello v. John B. Kelly, Inc., 283 F.2d 96 (3 Cir. 1960).

This fundamental error compels a new trial. It is therefore unnecessary for the court to consider appellant's contention as to the gross inadequacy of the verdict.

[9] Appellant seeks a new trial restricted to the issue of damages, or, in the alternative, a new trial on all issues. The jury, in finding a verdict for the plaintiff, necessarily concluded that the defendant was negligent. Since the issue of damages in this case is distinct and separable from the issue of liability, and since the interests of justice will be best served by doing so, a new trial will be ordered restricted to the issue of damages.[10]

The judgment of the District Court will be reversed and a new trial will be ordered limited to the issue of damages.

GERALD McLAUGHLIN, Circuit Judge (dissenting).

The defendant's answer specifically pleaded the affirmative defense of plaintiff's contributory negligence. The defense attorney *opened to the jury* inter alia on that affirmative defense. He stated that it was the main defense contention that the railroad had not been negligent with respect to plaintiff and his accident and then said "but if there were any

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[10] Rule 59(a) Fed.R.Civ.Proc., 28 U.S.C.; Cromling v. Pittsburgh & Lake Erie R.R. Co., 327 F.2d 142 (3 Cir. 1964; Darbrow v. McDade, 255 F.2d 610 (3 Cir. 1958).

negligence of the railroad, Mr. Paluch was right with them on that point." Before us that statement is described by appellant as "The innuendo and suggestion of the defendant *under the allegation of contributory negligence* was an attempt to impute the negligence of the foreman Brickman to the plaintiff, and also that plaintiff in carrying out the orders of Brickman, who created the situation which directly and proximately caused the accident, *assumed the risk.*" (Emphasis supplied.)

It is undenied that the foreman and the crew, including plaintiff, were on the ground of the accident the day before it occurred. It is also undenied that the foreman at that time applied the railroad testing methods to the particular pole later involved. The foreman had been using those methods for twenty-one years. They consisted of pushing the pole to ascertain movement if any and going down by the ground and jabbing his knife into the pole "and you could tell whether it was rotted or not." According to the foreman and undenied, the pole had a shorter pole snubbed snugly to it for added strength. Plaintiff and the other members of the party were to the east of the pole when the foreman made his tests. From the testimony he was in full view of those men. Plaintiff testified that he did not see the foreman testing the pole. He also said that he looked at the pole and that "To me it looked good, from the outside it looked good." The foreman, the day of the accident, looked the pole over and it looked the same as the day

before. He was asked if there had been any conversation about the pole between the plaintiff and himself before the accident. *He answered, "Yes, once he asked me if I thought it was safe, and I said* yes." (Emphasis supplied.)

The trial judge in his charge stated the plaintiff's claim, then said:

> "The defendant, answering, states, of course, that it was not guilty of any negligence which was a proximate cause or in any way contributed to the happening of the accident, and that if you should find that it was, that the plaintiff himself was guilty of negligence which also helped to bring about the accident.
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> * * * * * *
>
> "The defendant, when he denies negligence, and says the plaintiff was contributorily negligent, has the burden of proving this contributory negligence of the plaintiff. Proof must be also by a fair preponderance of the evidence.
>
> * * * * * *
>
> "Contributory negligence is the fault on the part of the person injured which contributed in some degree to the negligence of another and helps bring about the injury."

In discussing the determining factors for the jury the judge soundly charged on negligence and contributory negligence. On the question of damages he included the rule, in the event of finding the railroad negligent and contributory negligence on the

part of the plaintiff, of diminishing the amount awarded the latter.

After the conclusion of the charge the judge at side-bar asked counsel for both sides "Any exceptions?" Each attorney answered "No, sir."

Following the verdict and judgment in favor of the plaintiff there was a motion for a new trial by plaintiff. At the hearing thereon the following transpired:

> "Mr. Tyne: Your Honor, this is an application or motion to set aside the verdict of the Jury which was rendered on December 1, 1966, in favor of the plaintiff for $6000 on the ground that the verdict is unconscionable and grossly inadequate.
>
> * * * * * *
>
> Mr. Tyne: If your Honor please, may I be heard on that, sir? I don't propose to impose on your Honor because I know your Honor has a picture of this case in mind, but under your Honor's charge, you did charge the subject of negligence and contributory negligence, and you instructed the Jury on both questions and instructed them that if they should find contributory negligence, they should assess the percentage in that regard.
>
> The Jury returned a verdict in favor of the plaintiff on the basis of negligence alone, and in so doing, found there was no contributory negligence.
>
> * * * * * *

Your Honor instructed them on the question of contributory negligence, but in so doing instructed them to assess any percentage of contributory negligence they might have found. When they came in with the verdict in favor of the plaintiff, they found negligence; they did not find any contributory negligence whatsoever.

* * * * * *

The Court: The verdict was for $6000, and that may have meant that they agreed to a larger sum but reduced it by reason of the contributory negligence of the plaintiff. There is no way in which the Jury considering damages alone, would be able to assesse the damages unless they knew about the question of contributory negligence.

Mr. Tyne: They knew that, sir, and I think the question that was presented to your Honor on the test that was supposed to have been given by Mr. Brickman, the foreman employed by the defendant, at the time or prior to, a day prior to the accident, and on which your Honor charged them that the standard testified to may be considered by the Jury, and they may consider whether or not it is reasonable or unreasonable.

The Jury came in and presented a question to the Court, which the Court answered, and in so doing, that question, and the verdict given by the Jury, indicates to me, at least, very clearly that the Jury considered all questions of negligence and contributory negligence and found

that the defendant was negligent, and that there was no contributory negligence.

The Court: How did you arrive at that conclusion?

Mr. Tyne: Because they said nothing about contributory negligence, and didn't assess the damage. In this case, as your Honor well knows, the law of comparative negligence applies, if they found any contributory negligence at all.

The Court: They returned a verdict of $6000 in accordance with the instructions, which said that if there was any contributory negligence on the part of the plaintiff, that they would take that into consideration and reduce the total sum of damages by the amount in proportion to the contribution of negligence on the part of the plaintiff.

There would be no way in which the Jury sitting on the question of damages alone would be able to find that out. There is no obligation on the Jury to say, 'We find $6000 because we find a degree of negligence is on the part of the plaintiff.'

Mr. Tyne: On the basis of the evidence alone, sir, the evidence as presented to the jury, looking at it coldly and from an impartial point of view, the evidence presented on the part of the plaintiff is overwhelming; that's my opinion. I think that's the factual situation that the Jury was called up to meet, and decide.

The Court: I don't know what was in the Jury's mind.

Mr. Tyne: Of course, I know that the Jury has been—a Jury is unpredictable, but when you look at the facts—

The Court: I am not looking at the facts. The Jury is looking at the facts.

Mr. Tyne: That's so, but as of now, I think that your Honor should look at the facts and decide whether or not there was anything in this factual complex that even suggested contributory negligence.

The Court: Unless you want me to rule as a matter of law that there was no contributory negligence on the part of the plaintiff, and I can't do that, how are you going to find out what the Jury found factually?

Mr. Tyne: On the basis of the uncontradicted evidence. This man here was a new man—

The Court: I know all about the facts of it, but the question of fact is for the Jury to determine, not for the Court, and there is no question of law presented to the Court on the question of contributory negligence.

Mr. Tyne: *Your Honor fully charged them on all of the elements of negligence and the elements of damage, and then they disregarded the Court's charge.*

The Court: No, I couldn't say that they did." (Emphasis supplied.)

As is self evident from the above, plaintiff's attorney thoroughly agreed with the submission of

the case to the jury by the trial judge, including the issue of plaintiff's contributory negligence. As is also self evident there was no request directly or indirectly even then for a finding as a matter of law that there was no contributory negligence. The attorney time and again stressed that there was no complaint about the way he thought the jury had passed upon that problem. He was entirely concerned with what he described as the outrageously small sum awarded.

On this appeal itself there is not one word from appellant that the contributory negligence charge should not have been given the jury or that it had not been correctly stated. As has been said, according to plaintiff's expressed theory the jury weighed the question and found that plaintiff had not been contributorily negligent. Plaintiff in this court, as on his motion for a new trial, simply asserts that he did not receive as large a verdict as he thinks he should have had. The definitive answer to the damage phase of the suit is that the verdict was not so inadequate as to shock the conscience of the trial judge who had seen the damage witnesses and heard their testimony.

I find no support in the record for the current conception of the trial. Contributory negligence was pleaded; was noted in the defense opening address. The testimony as to plaintiff's acts and conduct could have been fairly interpreted as evidencing fault on his part. Despite plaintiff's denial the jury

might well have found that he did see the foreman make his tests and did nothing about this except to make one casual inquiry of the foreman, asking the latter if he though it was safe and receiving the answer "Yes."

Indeed, as conceded, it is only on oral argument of this appeal that for the first time plaintiff seems to claim that the defendant offered no proof, formally so labeled, of plaintiff's contributory negligence and therefore that defense, prominent in the case from the moment answer was filed, should not be considered by this appellate court.

We too, as well as the district court, are judges of cases, not of "causes."[11] We are contained by the record. From the trial evidence therein, every last bit of pleadings and the constantly repeated trial pattern, contributory negligence was rightfully in this litigation from its beginning, through its presentation to the jury and including our consideration of the appeal. Our task is not the upholding of a technical rule. There was no error fundamental or otherwise by the trial judge. It seems to me that in the interest of not unwarrantably invading the true district court function, the judgment should be affirmed.

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[11] See Mr. Justice Harlan's article on Mr. Justice Black, H.L.R. V. 81, 1, p. 3.

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No. 320

IN THE

SUPREME COURT OF THE UNITED STATES

PERRY J. OWENS, *Petitioner*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*

Respondent's Reply to Petition for Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

QUESTIONS PRESENTED

1. When the jury finds that the Defendant in an FELA case was not negligent, can the Plaintiff on appeal contend that there is no evidence to support this finding when the Plaintiff has not filed a motion for instructed verdict in the Trial Court?

2. When the jury finds that the Defendant in an FELA case was not negligent, can the Plaintiff on appeal contend that there is no evidence to support this finding when the Plaintiff has not objected to that portion of the charge submitting acts of negligence on the part of Defendant?

3. Is there evidence to support the finding of the jury that Defendant was not negligent?

STATEMENT OF THE CASE

This case was brought by Petitioner, Perry J. Owens, against Respondent, The Atchison, Topeka and Santa Fe Railway Company, under the Federal Employers Liability Act (FELA) to recover damages for alleged injuries sustained while working with a rivet gang repairing a pulpwood car at Respondent's railroad yards in Cleburne, Texas. The car was supported by tripods while being repaired. The wood flooring of the car had been removed so that only the metal beams remained across the floor of the car. The rivet gang was driving rivets into the exposed metal beams. After a heated rivet was placed in a hole in one of the beams, it was Petitioner's job to push the rivet up into the hole and clamp it. Another employee, John Johnson, then would drive the rivet from the other side of the beam to form a head on the rivet and lock it firmly into place. Petitioner was injured while on his knees underneath the elevated car clamping the rivets. Johnson, who stood above him on a metal beam driving the rivets, attempted to cross from one side of the beam to the other and lost his footing, falling on Petitioner (Tr. 31).

Petitioner alleged three acts of primary negligence on the part of Respondent and the jury in response to special issues found that Respondent was not negligent. The only one of these alleged acts of negligence of importance is the one wherein the jury found that Johnson was not negligent in losing his footing and falling upon Petitioner, as it is the finding on this

act of negligence that Petitioner contends is not supported by the evidence. In addition to these acts of primary negligence, the Court submitted to the jury several acts of contributory negligence on the part of the Petitioner and the jury also found that Petitioner had not been negligent.

Petitioner appealed to the Court of Appeals for the Fifth Circuit contending primarily that there was no evidence to support the jury's finding that Johnson was not negligent in falling on him. The Court of Appeals affirmed, holding that Petitioner had failed to preserve the point for appeal because at the trial he had failed to attack the sufficiency of the evidence in any manner available to him. *Owens v. The Atchison, Topeka and Santa Fe Ry. Co.*, 393 F.2d 77 (5th Cir. 1968).

REASONS FOR DENYING THE WRIT

I.

This Court has clearly stated in Rule 19, Supreme Court Rules, that a writ will be granted only where there are special and important reasons therefor. Petitioner has failed in this regard in that the decision of the Court of Appeals in this case does not fall within any of the reasons stated in Rule 19(b), Supreme Court Rules.

II.

Petitioner failed to file a motion for a directed verdict in accordance with Rule 50(a), Federal Rules of Civil Procedure, and accordingly is in no position now to contend that there is no evidence to support the finding of the jury that Respondent was not negligent. See *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1967); *Powers v. Gilmour*, 297 F.2d 138 (5th Cir. 1961); *Pennsylvania National Mutual Casualty Ins. Co. v. Nathan*, 361 F.2d 18 (5th Cir. 1966); *Home Insurance Co. of New York v. Davila*, 212 F.2d 731 (1st Cir. 1954); *Muryn v. New York Central R.R.*, 270 F.2d 645 (2d Cir. 1959) (per curiam), cert. denied, 362 U.S. 918 (1960); *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129 (3rd Cir. 1965); *Pruett v. Marshall*, 283 F.2d 436, 438 (5th Cir. 1960); *Southern Ry. Co. v. Miller*, 285 F.2d 202, 206 (6th Cir. 1960); *Charles v. Norfolk & Western Ry. Co.*, 188 F.2d 691, 692 (7th Cir.), cert. denied, 342 U.S. 831 (1951); *Tsai v. Rosenthal*, 297 F.2d 614, 618 (8th Cir. 1961); *Zimmerman v. Emmons*, 225

F.2d 97, 99 (9th Cir. 1955), cert. denied, 350 U.S. 932 (1956); and *Brown v. Poland*, 335 F.2d 984, 985, 986 (10th Cir. 1963).

III.

The Charge of the Court submitted to the jury the issues of whether Respondent was guilty of acts of negligence. If there was no evidence warranting the submission of such issues, Petitioner was required by Rule 51, Federal Rules of Civil Procedure, to object to the Charge asserting such contention. Having failed to object, Petitioner is now in no position to challenge the sufficiency of the evidence to support the jury's verdict. See *Berman v. Palatine Ins. Co.*, 379 F.2d 371 (7th Cir. 1967); *Rochester Civic Theatre, Inc. v. Ramsay*, 368 F.2d 748 (8th Cir. 1966); *Stokes v. Continental Assurance Co.*, 242 F.2d 893 (5th Cir.), cert. denied, 355 U.S. 890 (1957); and *Boudreaux v. Mississippi Shipping Co.*, 222 F.2d 954 (5th Cir. 1955).

IV.

Even if the Petitioner had preserved his right to complain about the sufficiency of the evidence, this Court should deny the writ because the finding of the jury is supported by the evidence. This Court has made it clear in *Rogers v. Missouri Pac. Co.*, 352 U.S. 500 (1957) and subsequent decisions, that the fact finding function on negligence should be left to the jury in all but the infrequent cases where fairminded jurors could not honestly differ.

This principle concerning the significance of the

jury's verdict applies, of course, with equal force in all FELA cases, no matter whether the jury happens to decide in favor of the employee or employer. Thus, while it is true that a majority of Supreme Court decisions have dealt with findings of negligence in favor of the plaintiff, the same principles expressed therein obviously apply in the instant case in which the jury returned a finding of no negligence in favor of the employer. Hence, the jury's verdict must stand unless Petitioner is able to show that this is one of those extremely infrequent cases in which there is a complete absence of probative facts to support the conclusion reached by the jury.

A brief summary of the evidence presented on the issue of negligence shows that the jury was fully warranted in concluding that Petitioner failed to prove his injury was caused by any negligence on the part of Respondent. At the outset, it should be noted that with regard to the sufficiency of the evidence, Petitioner limits his complaint to a narrow point. He attacks the sufficiency of the evidence *only* with regard to the question whether John Johnson was negligent in losing his balance and falling on Petitioner.

Petitioner's testimony revealed evidence from which the jury could easily conclude that neither Johnson nor Respondent was negligent. Petitioner stated by deposition that Johnson "just accidentlly got overbalanced and fell on top of me." (Tr. 57). He conceded there was enough open space in the floor of the car to have allowed him to see John Johnson if he had looked up. (Tr. 52). Significantly, Petitioner did not know of

anything Respondent could have done to avoid the accident. (Tr. 57). Surely the jury was warranted in taking Petitioner's own statements, the truth of which he never denied, at face value.

Bill Glenn, called by Petitioner, testified merely that John Johnson had fallen upon Petitioner (Tr. 72-73). Glenn did not testify as to any negligence by Petitioner or Johnson in any respect. (Tr. 66-75).

The testimony of John Johnson (Tr. 75-103) created several factual disputes which were resolved by the jury against Petitioner. John Johnson testified on the one hand that the heat from the rivets had caused his goggles to fog up; on the other, on cross-examination he stated that notwithstanding the fogging up of his goggles, he nevertheless could see through them. (Tr. 89, 97). While on the one hand he stated he did not believe he had looked where he was stepping, on the other he said he was familiar with the flooring of the car and knew where the beams were because he had been performing the same job for some time. (Tr. 96). He stated it was necessary for him to go over the beam when changing positions rather than under it. (Tr. 101). And in a report which he filed with Respondent, his employer, he stated he had lost his balance and fallen on top of Petitioner.

These factual disputes presented an evidentiary case for the jury. It was up to the jury to decide the extent to which John Johnson could see through his goggles and whether it was necessary for adequate vision that they be absolutely clear; whether he was negligent in not looking where he stepped or whether

a reasonable man who was familiar with the area also would not have looked down with each step; whether it was reasonable for him to stay on top of the beam while changing positions rather than going underneath it; and whether it was Respondent's negligence which had caused the fall or whether it was merely a case of a man who lost his balance while working under reasonably safe conditions.

In short, Petitioner's evidence of negligence was extremely weak, and yet he requests the Court to render the drastic and unusual holding that there was negligence as a matter of law. This request has no basis either in law or in fact. Under the circumstances of this case, it would be "an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses, and arrive at a conclusion opposite from the one reached by the jury." *Lavender v. Kurn*, 327 U.S. 645, 652 (1945).

RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT

I.

Petitioner in his Petition for Writ of Certiorari asserts that the decision of the Circuit Court in this case is directly in conflict with three decisions of the Court of Appeals for the Third Circuit. With regard to two of these cases, we shall only briefly discuss them as Petitioner does not discuss them at all. Both *Freifield v. Hennessy*, 353 F.2d 97 (3rd Cir. 1965) and *Atkinson v. Roth*, 297 F.2d 570 (3rd Cir. 1962), concern the right of a Circuit Court to consider error in the charge of the Court in view of the failure of Appellant to object to the charge and in both instances the Third Circuit held that an exception applied in that the error of the court in the charge was fundamental and a highly prejudicial error. The sufficiency of the evidence was not involved at all and clearly, the holding of the Court of Appeals in the instant case is not in conflict with these cases.

In *Paluch v. Erie Lackawanna R.R. Co.*, 387 F.2d 996 (3rd Cir. 1968), the case was submitted to the jury by a general charge and the trial court instructed the jury both on primary negligence and contributory negligence. The Third Circuit concluded that there was no evidence warranting a charge on contributory negligence and therefore that the trial court had erred even though plaintiff had failed to object to the charge on this basis. There are two reasons why the opinion of the Fifth Circuit in this case is not in conflict with the holding of the Third Circuit in *Paluch v. Erie*

Lackawanna R.R., supra. First, the court in *Paluch* recognized that that case applied the sole exception to the general rule requiring an objection to the charge in order to obtain review on appeal of the sufficiency of the evidence. That exception is the rare instance where error is apparent on the face of the record which if not noticed would result in a manifest miscarriage of justice. Otherwise, the Third Circuit follows the general rule and requires an objection to the charge as a predicate for review of the sufficiency of the evidence. See *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129 (3rd Cir. 1965). Second, in *Paluch*, the portion of the charge to which Plaintiff failed to object was the defensive issue of contributory negligence which was requested by Defendant. In the case now before this Court, that portion of the Charge to which Petitioner failed to object was the primary negligence issues which were requested by Petitioner himself. In other words, Petitioner is now before this Court stating that there was error in submitting to the jury the very primary negligence issues upon which Petitioner relied and which Petitioner requested that the Court submit to the jury.

We do not believe there is any conflict in the decision by the Circuit Court in this case and the decision of the Third Circuit in the *Paluch* case. However, if we should be wrong in this regard, and this Court should feel that the decision in the *Paluch* case should be followed, then this Court would still have to find that there was fundamental error in the decision of the District Court. This Court would also have to find that a jury could not properly find an absence of neg-

ligence on the part of Respondent. In the earlier part of this brief we have already summarized the evidence which clearly raised a fact issue so that no further discussion of that need be made. However, we do want to further discuss "fundamental error" and inquire as to what the fundamental error in this case would be. In the *Paluch* case, the fundamental error was the error of the District Court in charging the jury on the issue of contributory negligence and its diminishing effect upon any verdict it might find in favor of Appellant. In this case, Petitioner does not contend that the Trial Court erred in any respect. The Trial Court submitted the case to the jury just exactly the way Petitioner wanted it submitted to the jury so that his only complaint is to the finding by the jury. In order for any party to seek a reversal of a case, he must complain of some action of the Trial Court and yet in this case, we find no such complaint. Therefore, there can be no basis for reversal of the decision of the Trial Court and Circuit Court.

II.

Respondent certainly agrees with Petitioner when he states "Petitioner was not entitled to a directed verdict." However, the issue is not whether the Petitioner was entitled to a directed verdict, but whether Petitioner had to make a motion for directed verdict before he can complain on appeal that there was no evidence to support a finding by the jury. As indicated by the cases already cited (p. 4 of this brief), it is well decided that he must make such a motion. The fact that issues of fact were raised on contributory

negligence did not do away with the necessity for Petitioner to file a motion for directed verdict. Petitioner cites the case of *Fairmount Glass Works v. Cub Fork Coal Company*, 287 U.S. 474 (1932), in support of this contention but it is clear that a directed verdict was denied in that case for the reason that conflicting evidence had been presented on the issue of liability. In other words, a motion for directed verdict was actually made so that this case does not even come close to supporting the position of Petitioner.

III.

Petitioner asserts that there is confusion in the Circuit Courts because of their failure to recognize the distinction between "no evidence" and "sufficiency of the evidence". He fails to cite any case to show this confusion but the argument made by Petitioner indicates confusion only on the part of Petitioner. Apparently, Petitioner feels that "fundamental error" has occurred any time that a plaintiff in a FELA case loses. Perhaps this is unusual, but surely this Court is not going to back up on *Rogers v. Missouri Pacific Co.*, supra, simply because the jury has found for the defendant for a change. This Court has consistently held that the issue of negligence of the defendant is one of fact for the jury and not one of law for the Court.

IV.

Petitioner has received a fair trial and has no justification for accusing the Circuit Court of "pettifoggery." Petitioner asserts that Rules 50 and 51 of the

Federal Rules of Civil Procedure should not be applied to a case brought under the Federal Employers Liability Act, but the underlying reason is not clear. It is significant that Petitioner does not cite a single case supporting this view. The cases cited in Petitioner's brief, page 5, merely explain that contributory negligence by an employee does not completely bar his recovery under the Federal Employers Liability Act. However, the theory of comparative negligence is of no consequence in a case such as the one now before the Court where the employee is unable to prove any primary negligence on the part of his employer.

Petitioner asks the question in this part of the brief as to how Plaintiff can protect himself where he relies on more than one act of primary negligence. This is quite simple. Obviously, Petitioner is required to prove only one ground of negligence to recover, and if he believed that the evidence was such that the jury would not be entitled to return a finding of no negligence on Johnson's part, Petitioner should have asked the Court to direct a verdict in his favor on that issue, reliance on the other two grounds thereby becoming unnecessary. This is exactly what this Court prescribes should be done by Rule 50. But if the Trial Court had directed a verdict for Petitioner which was later reversed on appeal, Petitioner would have had to face a new trial. Thus, the choice between asking for a directed verdict or leaving the case to the jury is something of a gamble. And if in a doubtful case, a party chooses to leave his case to the jury, as the Petitioner did in this case, he should be bound by his choice. See *Stokes v. Continental Assurance Co.*, 242

F.2d 893 (5th Cir.), cert. denied, 355 U.S. 890 (1957).

V.

We believe that we have clearly shown to the Court that Petitioner presents nothing of importance in this Petition. The only thing unusual about this case is that the Plaintiff failed to win in an FELA case.

VI.

The appellate courts and the attorneys have already been given a tool by which they can assign errors in law created by a jury refusing to follow the evidence. These tools are prescribed in Rules 50 and 51 of the Federal Rules of Civil Procedure promulgated by this Court. If these rules are not followed by the parties practicing before the Court, then it is beyond the power of this Court or any other Court to help the parties.

CONCLUSION

This Respondent and most other railroads have argued many times in this Court that findings by a jury that the railroad was negligent were not supported by the evidence. Almost without exception, this Court has said that the question of negligence was to be decided solely by the jury. These cases are well known to the Court and in many of such cases, the inference of negligence was weak at best.

The Circuit Court in this case could easily have found that the finding of the jury was supported by the evidence and would have done so if it had gotten to that point. However, the Circuit Court very properly felt that this appeal should not have been filed in that Petitioner had failed to preserve any question for appeal insofar as the sufficiency of the evidence was concerned. The decision of the Circuit Court is therefore not based upon a technicality; it is based upon a very fundamental principle of appellate practice. This principle is that the appealing party must complain of some error on the part of the Trial Court.

In the absence of a motion for instructed verdict or objection to the charge, there is no error on the part of the Trial Court. The complaint of Petitioner therefore is not that the Trial Court erred, but that the jury erred. If a Trial Court asks the jury to decide whether a defendant was guilty of negligence under the evidence, the jury has not erred irrespective of whether it finds that there was or was not negligence. If there was no evidence to raise the issue of negligence or if the evidence proved negligence as a matter

of law, then the error committed was that of the Trial Court in even submitting the issue of negligence to the jury. Very properly, the Federal Rules of Civil Procedure and decisions of all courts require that this error be called to the attention of the trial court before the error is even made.

Otherwise, this Court and all appellate courts will be faced with appeals in every jury case based not on the error of the Trial Court, but based on the error of the jury in "refusing to follow the evidence or the law." This quotation, of course, is from the last sentence in Petitioner's Writ and shows the absurdity of the position of Petitioner. This is a typical statement of any losing party after a jury trial.

WHEREFORE, premises considered, Respondent prays that the Petition for Certiorari be denied.

Respectfully submitted,

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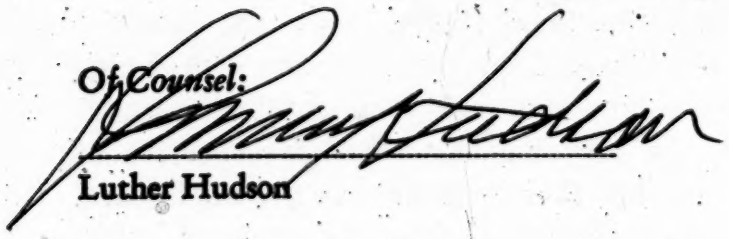

Luther Hudson

I certify that a copy of the foregoing Reply to Petition for Certiorari has been mailed on the 15 day of August, 1968 to Otto B. Mullinax, Mullinax, Wells, Mauzy, Levy & Richards, 1601 National Bankers Life Building, Dallas, Texas, Attorneys for Petitioner.

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